

STATE WATER RESOURCES CONTROL BOARD
WORKSHOP--OFFICE OF CHIEF COUNSEL
JUNE 1, 2005

ITEM 13

SUBJECT

IN THE MATTER OF THE PETITIONS OF TROUT UNLIMITED (FAILURE TO ISSUE NPDES PERMIT TO CALIFORNIA DEPARTMENT OF FISH AND GAME FOR ITS USE OF ROTENONE IN SILVER KING CREEK IN ALPINE COUNTY [PAIUTE CUTTHROAT TROUT RECOVERY INFORMATION PROJECT]); CALIFORNIA DEPARTMENT OF FISH AND GAME; AND UNITED STATES FISH AND WILDLIFE SERVICE (FAILURE TO ISSUE NPDES PERMIT TO CALIFORNIA DEPARTMENT OF FISH AND GAME AND UNITED STATES FISH AND WILDLIFE SERVICE FOR THEIR USE OF ROTENONE IN SILVER KING CREEK IN ALPINE COUNTY [PAIUTE CUTTHROAT TROUT RECOVERY INFORMATION PROJECT]), LAHONTAN WATER BOARD: BOARD WORKSHOP NOTIFICATION
SWRCB/OCC FILES A-1669 AND A-1669(a)

LOCATION

Alpine County

DISCUSSION

The Lahontan Regional Water Quality Control Board (Lahontan Water Board) declined to issue a National Pollutant Discharge Elimination System (NPDES) permit to the Department of Fish and Game for the use of Rotenone in Silver King Creek as part of a program to restore Paiute Cutthroat Trout in the area. Though no vote was taken, individual Lahontan Water Board members indicated that they did not believe enough information had been provided by the project applicant to determine the full effects of the project on endangered species. They also indicated that they did not believe the Lahontan Water Board had received enough information to assess the recovery of the site within two years after the use of the Rotenone, as is required by the Basin Plan. This order concludes that the Lahontan Water Board acted appropriately.

POLICY ISSUE

Should the State Water Resources Control Board (State Water Board) require the Lahontan Water Board to issue an NPDES permit?

FISCAL IMPACT

State Water Board: none.

REGIONAL WATER BOARD IMPACT

Will eventually need to conduct a new hearing.

STAFF RECOMMENDATION

Adopt order as presented.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2005-

In the Matter of the Petition of

**TROUT UNLIMITED, CALIFORNIA DEPARTMENT OF FISH
AND GAME, AND UNITED STATES FISH AND WILDLIFE
SERVICE**

For Review of to issue an NPDES permit to the California Department of Fish and Game for use of Rotenone in Silver King Creek in Alpine County [Paiute Cutthroat Trout Recovery Information Project]),
California Regional Water Quality Control Board,
Lahontan Region

SWRCB/OCC FILE A-1669 AND A-1669(A)

BY THE BOARD:

On September 8, 2004, the Lahontan Regional Water Quality Control Board (Lahontan Water Board), declined to issue a National Pollutant Discharge Elimination System (NPDES) permit to the California Department of Fish and Game (DFG) for the application of the aquatic pesticide Rotenone in Silver King Creek. The application was part of a DFG project to reintroduce Paiute Cutthroat Trout into water bodies where they once lived but have since been driven out by invasive, non-native species.

The issue of whether the permit ought to be issued was presented to the Lahontan Water Board after some delays and the circulation of a proposed permit. DFG requested immediate issuance of the permit because the project had to be carried out no later than the middle of September (the following week) because of seasonal weather considerations. After a public hearing, the Lahontan Water Board took no vote with respect to approval of the permit. Individual Board members stated their concerns but no motion of any kind was offered. Timely petitions were filed by DFG on behalf of itself and the United State Fish and Wildlife Service

and by Trout Unlimited, a non-profit advocacy group. This order addresses significant issues raised in those petitions. All other issues are dismissed.¹

I. BACKGROUND

DFG engages in various projects to restore native populations of fish in their historic habitats. One such program has involved the reintroduction of Paiute Cutthroat Trout in various watersheds along the eastern side of the Sierra Nevada. In order to restore one species, it is often necessary to eradicate invasive, non-native species whose presence makes the restoration project problematic. To do so, DFG will introduce chemicals into the entire water body, killing many life forms along with the non-native, targeted species.

On May 24, 2004, DFG submitted an application to the Lahontan Water Board for an NPDES permit to use the aquatic pesticide Rotenone in a significant portion of Silver King Creek. Rotenone kills any and all gill-breathing organisms in the target area by interfering with oxygen use at the cellular level. It is not a poison in the accepted sense and thus is not dangerous to birds or mammals that eat the dead fish.² The project area is located within federally designated wilderness areas in the Humboldt-Toiyabe National Forest. The area is part of the East Fork Carson River Hydrologic Unit and is a few miles south of Markleeville.

In the early 1990s, DFG successfully reintroduced Paiute Cutthroat Trout to upper portions of Silver King Creek in a segment that is above a natural fish barrier, Llewellyn Falls. DFG and others are concerned that non-native fish from below the barrier could be easily but illegally transplanted above the Falls and destroy the Paiute Cutthroat Trout population in the upper Creek. DFG therefore proposed to eradicate much of the fauna in the lower portions of the Creek and reintroduce the Paiute Cutthroat Trout there as well. A permit from the Lahontan Water Board was necessary to carry out the project.³

Witnesses from DFG, Fish and Wildlife, the Forest Service, and Trout Unlimited testified in support of the project. A number of interested parties, some with scientific credentials, testified against the project. Generally speaking, the former stated that all environmental issues had been addressed while the latter testified that there were gaps related to

¹ See *People v. Barry* (1987) 194 Cal.App. 3d 158 [239 Cal.Rptr. 349]; Cal.Code Regs., tit. 23 § 2052(a)(1).

² Department of Fish and Game web site (dfg.ca.gov): *Inland Fisheries—Information Leaflet No. 20*.

³ *Headwaters, Inc. v. Talent Irrigation District* (2001) 243 F. 3d 546. The United States Environmental Protection Agency is currently reviewing the application of the Clean Water Act to pesticide use. See 70 Fed.Reg. 5093.

threatened or endangered species. Without adopting a motion, various members of the Lahontan Water Board indicated that they would not approve the permit because they were not satisfied with the amount of information made available to them regarding threatened and endangered species.⁴ Some also indicated a concern with the recovery of the Creek and asked for more information on pre-existing beneficial uses so that staff would be able to measure compliance with the Basin Plan requirement that there be full recovery of such uses within two years of the project.⁵

II. CONTENTIONS AND FINDINGS

1. Contention: The failure of the Lahontan Water Board to act is inconsistent with its responsibilities under California Environmental Quality Act (CEQA).

Finding: Trout Unlimited, California Department of Fish and Game, and the United States Fish and Wildlife Service (Petitioners) have argued that the decision of the Lahontan Water Board to take no action essentially attacks “the sufficiency of the Department’s initial study and the MND [mitigated negative declaration].” They argue that the Lahontan Water Board “has already legally waived its objections to the Department’s MND. Thus, the Lahontan Water Board was bound by the Department’s findings in considering the environmental effects of the Project.” In other words, Petitioner’s argue that the Lahontan Water Board could raise no further environmental objections since it did not object to the mitigated negative declaration and prepare its own CEQA document.

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⁴ No member of the Board made a motion to approve the permit so no vote was taken. No formal statement of the reasons for not taking action was made.

⁵ “Within two years of the last treatment for a specific project, a fisheries biologist or related specialist from the DFG must assess the restoration of applicable beneficial uses to the treated waters, and certify in writing that those beneficial uses have been restored.” Water Quality Control Plan p. 4.9-25.

This broad assertion is not supported in the petition by any citations to case law. In administering the federal Clean Water Act and the state's Porter Cologne Water Quality Control Act, the Lahontan Water Board cannot transfer its decision-making power to another agency. Moreover, in light of the exemption from CEQA compliance for issuance of NPDES permits in Water Code section 13389, the Board had no legal obligation to prepare an alternative document. While the Lahontan Water Board could have assisted DFG by commenting, its failure to object to the mitigated negative declaration has no legal consequence and does not divest the Board of its statutory obligations and authority. The Lahontan Water Board must, first and foremost, carry out the requirements of its own water quality control plan. That plan contains the following language with respect to DFG projects utilizing Rotenone:

“Threatened or endangered aquatic populations (e.g., invertebrates, amphibians) shall not be adversely affected [by the application of rotenone]. The DFG shall conduct pre-project monitoring to prevent rotenone application where threatened or endangered species may be adversely impacted.” Page 3-12

Irrespective of what CEQA document may or may not have been prepared by the project proponent, the Lahontan Water Board has an independent duty to make sure that the terms of its water quality control plan have been met. In this case, the Board members were clearly unconvinced that DFG had conducted sufficient pre-project monitoring for threatened or endangered aquatic populations and had an obligation not to approve the permit until those concerns were addressed.

2. Contention: The refusal of the Lahontan Water Board to approve the permit obstructs the implementation of the Endangered Species Act and threatens restoration efforts for the Paiute Cutthroat Trout.

Finding: The Petitioners assert that the Lahontan Water Board's failure to act threatens the future survival of the Paiute Cutthroat Trout as a species. There can be no doubt that the species is in some degree of difficulty and its extinction is always a real possibility. Staff testified at the hearing the Paiute Cutthroat Trout is “possibly the rarest trout subspecies in North America.” However, testimony from Petitioners in the record makes it clear that the delay of this particular project by a reasonable period of time is not likely to imperil long-term recovery efforts.

There are, at present, three populations of this species of trout in the Silver King Creek basin as well as four other populations in Cottonwood Creek, Cabin Creek, Stairway

Creek, and Sharktooth Creek. While a hypothetical catastrophe could conceivably cause the simultaneous destruction of all seven populations, Petitioners have offered no evidence to show that the establishment of this eighth population would make any difference in that case. At the Lahontan hearing, a representative of the United States Fish and Wildlife Service acknowledged that a delay of three years would not “really do anything to the Recovery Plan.” The list of projects would simply have to be rearranged.

There is no indication in the record that members of the Lahontan Water Board intend to refuse to issue a permit to DFG for this project after receipt of requested information. The record simply shows that the members believed, based on the presentations of staff, the DFG, Fish and Wildlife, and several interested persons that more preliminary study was necessary to make sure that threatened or endangered species were not harmed and that the ecosystem would recover in a reasonable period of time.

III. CONCLUSION

The Lahontan Water Board took no action on a request to issue an NPDES permit. The State Water Board will not direct a regional water board to issue an order unless it is clear from the record that the evidence and the circumstances require it. In this case, there does not seem to be a compelling need to approve the permit without further study. The Lahontan Water Board did not violate CEQA, which does not even apply to NPDES permits, by insisting on enough evidence to conclude that its Basin Plan has been followed. The matter is still pending before the Lahontan Water Board and there is no indication in the record that a permit will be denied DFG if more information is made available to the members.

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IV. ORDER

IT IS HEREBY ORDERED that the petitions in this matter are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 16, 2005.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Debbie Irvin
Clerk to the Board